Brunsfield Information Technology Sdn Bhd v Masterloq Technologies Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING UP) NO D1-28-753 OF 2002
VINCENT NG J
1 AUGUST 2003

Companies and Corporations — *Winding up — Petition under s 218 of the Companies Act 1965 — Respondent denied being indebted to petitioner and argued the claim was premature — Whether there exists a bona fide dispute of debt to allow a winding up petition taken against the respondent — Companies Act 1965 s 218*

The petitioner was appointed as the respondent's sub-contractor in a project. The parties had not agreed upon the sub-contract price. Thus, the petitioner presented a petition to wind up the respondent after serving a notice of demand pursuant to s 218 of the Companies Act 1965 demanding payment for the outstanding progress claims for works done by the petitioner for the respondent. The respondent denied being indebted to the petitioner and argued that the petitioner's claim was premature as the actual amount due to the petitioner, if any, could only be determined after the rectification work was fully completed. Until this could be ascertained conclusively, the amount claimed by the petitioner could not constitute a debt which was due and payable by the respondent. Hence, the issue to be determined was whether there was a bona fide dispute of debt to allow a winding up.

Held, dismissing the petition with costs:

(1) Having carefully considered all the facts, the court was of the opinion that the there was a bona fide dispute of the debt. For winding up proceedings, the debt claimed by the petitioner should be patent and not merely established by argument. Otherwise, the winding up proceedings would be an abuse of the process of the court. In light of the substantial dispute as to the debt, a winding up petition was not a permissible exercise of the process of the court (see p 308B–D).

(2) The solvency of a respondent company would be of relevant consideration only if the court found no serious dispute on cogent grounds as to the sum claimed. It was clear that there were serious issues to be determined before it could be established that the respondent was indebted to the petitioner as the granting of orders in terms of the petition would not only jeopardize the ongoing business of the respondent but also cause irreparable damage to their reputation. Any loss sustained by the respondent could not later be compensated by damages or costs. Thus, it would not be just or equitable to wind up the respondent (see p 309F–I).

[Bahasa Malaysia summary

Pempetisyen telah dilantik sebagai subkontraktor responden dalam satu projek. Pihak-pihak tidak bersetuju dengan harga subkontrak tersebut. Oleh itu, pempetisyen telah mengemukakan satu petisyen untuk menggulungkan responden setelah menyampaikan satu notis tuntutan menurut s 218 Akta Syarikat 1965 menuntut bayaran untuk baki tuntutan-tuntutan progresif untuk kerja-kerja yang telah dilaksanakan oleh pempetisyen untuk responden. Responden menafikan berhutang kepada pempetisyen dan berhujah bahawa tuntutan pempetisyen adalah pra masa kerana jumlah sebenar yang perlu dibayar kepada pempetisyen, jika ada, hanya boleh ditentukan selepas kerja-kerja pembetulan telah selesai sepenuhnya. Sehingga ini dapat ditentukan dengan konklusifnya, jumlah yang dituntut oleh pempetisyen tidak boleh membentuk hutang yang tertunggak dan perlu dibayar oleh responden. Justeru itu, persoalan untuk ditentukan adalah sama ada terdapat satu pertikaian bona fide mengenai hutang.

Diputuskan, menolak petisyen tersebut dengan kos:

(1) Setelah meneliti kesemua fakta-fakta, mahkamah berpendapat bahawa terdapat satu pertikaian bona fide mengenai hutang tersebut. Untuk prosiding penggulungan, hutang yang dituntut oleh pempetisyen hendaklah jelas dan bukan hanya dibuktikan melalui hujahan. Sekiranya tidak, prosiding penggulungan adalah satu penyalahgunaan proses mahkamah. Berhubung pertikaian yang substantif berkaitan hutang tersebut, satu petisyen penggulungan bukan satu pelaksanaan yang dibenarkan dalam proses mahkamah (lihat ms 308B–D).

(2) Pensolvenan syarikat responden memerlukan pertimbangan yang relevan yang jika mahkamah mendapati tiada pertikaian serius mengenai alasan-alasan yang meyakinkan berkaitan jumlah yang dituntut. Ia adalah jelas bahawa terdapat persoalan-persoalan yang serius yang perlu ditentukan sebelum dapat dibuktikan bahawa responden berhutang kepada pempetisyen kerana pemberian perintah seperti dipohon petisyen bukan hanya akan menjejaskan perniagaan responden yang berterusan tetapi juga mengakibatkan kerosakan yang tidak dapat dipulihkan terhadap reputasi mereka. Apa-apa kerugian yang dialami oleh responden tidak boleh dibayar dengan ganti rugi. Oleh itu, ia tidak adil atau saksama untuk menggulungkan responden (lihat ms 309F–I).]

Notes

For cases on winding up petitions under s 218 of the Companies Act 1965, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1229–1249.

Cases referred to

Kemayan Construction Sdn Bhd v Prestara Sdn Bhd [1997] 5 MLJ 608 (refd)

London and Paris Banking Corp, Re (1874) LR 19 Eq 444 (refd)

Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd, Re v Nima Travel Sdn Bhd [1986] 2 MLJ 374 (refd)

Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v Grand United Holdings Bhd [1998] 5 MLJ 345 (refd)

Legislation referred to

Companies Act 1965 s 218(2)

Renu Zachariah (*Cheryl Kwan* with her) (*Raslan Loong*) for the petitioner.
George Varughese (*George Varughese & Co*) for the respondent.

Vincent Ng J:

Preamble

The petitioner presented a petition to wind up the respondent on 21 August 2002.

It is common ground that the sum of RM148,476 claimed by the petitioner was not a judgment debt. The petitioner alleged that the said sum was the outstanding progress claims for works done by the petitioner for the respondent.

On 29 June 2002, the petitioner served a notice of demand pursuant to s 218 of the Companies Act 1965 ('the Act') demanding payment of RM148,476. The respondent denied being indebted to the petitioner vide a letter dated 12 July 2002.

The dispute

The following facts are undisputed. The petitioner was appointed as the respondent's sub-contractor in a project developed by BBN Development Sdn Bhd, to carry out the installation and other related works for an alarm system. The parties had not agreed upon the sub-contract price. The petitioner vide letter dated 4 April 2002, gave notice to the respondent of their intention to demobilize their workforce on the project. A joint inspection and valuation was conducted to identify the extent of the works completed and works that needed rectification.

The petitioner alleged that after the 'walk through', all rectification works were carried out and duly acknowledged by the respondent.

The respondent denied this, arguing that having demobilized their workforce on the project, the petitioner failed to complete the rectification work. If the petitioner had done so, a second 'walk through' would have been conducted to ascertain and verify the extent of the rectification works. The respondent pointed out that another sub-contractor has since been

appointed to carry out the rectification work, which was still ongoing and has to date cost the respondent an additional RM66,485.09. A

The respondent submitted that the petitioner's claim was premature as the actual amount due to the petitioner, if any, could only be determined after the rectification work was fully completed. Until this is ascertained conclusively, the amount claimed by the petitioner could not constitute a debt which is due and payable by the respondent. B

Having carefully considered all the facts put before me, I am of the opinion that the there is a bona fide dispute of the debt. For winding up proceedings, the debt claimed by the petitioner should be patent and not merely established by argument. Otherwise, the winding up proceedings would be an abuse of the process of the court. C

Questions of whether there were any prior complaints by the respondent, whether the petitioner was given any notice before the appointment of the new sub-contractor and whether it was the standard practice of the industry to conduct second 'walk throughs' to verify rectification works, in my mind, are all questions that needed to be resolved either in arbitration proceedings or in a civil suit where witnesses could be called to give evidence. In light of the substantial dispute as to the debt, a winding up petition is not a permissible exercise of the process of the court. D

I find support and am completely ad idem with Mahadev Shanker J in *Re Nima Travel Sdn Bhd Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 2 MLJ 374 at p 375 wherein he held: E

> There is a plethora of authorities to the effect that *a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company.*
>
> On the facts before me, I am satisfied that *there is a bona fide dispute as to* whether there is a debt due from the respondent to the petitioner and also *the quantum of such a debt.* (Emphasis added.) F

A similar view was expressed by Kamalanathan Ratnam JC (as he then was) in *Kemayan Construction Sdn Bhd v Prestara Sdn Bhd* [1997] 5 MLJ 608 at p 614:

G

> For the purpose of a right to wind up, I find the failure of the petitioner to comply with the architect's directive with regard to the defects clearly and without a doubt gave the respondent a right to dispute the interim certificate and it follows therefore that the debt is in dispute ...
>
> It is an irresistible conclusion to be drawn ... that whilst the petitioner may have completed the building and the architect had certified payments for the works, *yet the certificates by themselves cannot be deemed to be conclusive proof that the works of the petitioner were satisfactorily completed.* (Emphasis added.) H

Heavy weather was made over the respondent ability to pay their debts as they neglected to pay the sum demanded under the s 218 notice issued by the petitioner.

I

Section 218(2) of the Act provides that:

> A company shall be deemed to be unable to pay its debts if —

A (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the B reasonable satisfaction of the creditor; ...

Sir G Jessel MR had this to say in *Re London and Paris Banking Corp* (1874) LR 19 Eq 444 at p 446 when faced with a similar situation:

> ... It is very obvious, on reading that enactment, that the word 'neglected' is not necessarily equivalent to the word 'omitted'. Negligence in paying a debt C on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is bona fide disputed by the debtor, ..., then in that case he has not neglected to pay, and is not within the wording of the statute.

D Kamalanathan Ratnam JC (as he then was) relying on the passage above held in *Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v Grand United Holdings Bhd* [1998] 5 MLJ 345 at p 365:

> There is clear evidence that there was no 'neglect' on the part of the respondent to pay the sum demanded. The non-payment was by design ...
>
> *I therefore find that where there is a serious dispute as to the sum claimed and* E *that on this genuine and strenuous ground, based on substantial material and belief, a respondent fails to pay the sum demanded, such failure to pay cannot fall within the meaning of neglect as in the statute.* However if there is liability, then a failure to pay whether by reason of carelessness, inadvertence, dilatoriness or mulishness, is neglect within the wording of the statute. *The dividing line is the genuine challenge to the issue of liability. Once this challenge is raised, there is no* F *longer a basis to found neglect within the meaning of s 218(2)(a).* (Emphasis added.)

I was, however, mindful of the fact that, despite maintaining that they were solvent, the respondent had overdrawn on their current account at RHB Bank Bhd to the tune of RM237,541.89 as at 31 July 2002 (exh MMR 12 G encl 18). Be that as it may, as I have ruled in an earlier case, the solvency of a respondent company would be of relevant consideration only if the court finds no serious dispute on cogent grounds as to the sum claimed.

Conclusion

H It is clear that there are serious issues to be determined before it can be established that the respondent is indebted to the petitioner as the granting of orders in terms of the petition would not only jeopardize the ongoing business of the respondent but also cause irreparable damage to their reputation. Any loss sustained by the respondent cannot later be compensated by damages or costs.

I I hold that it would not be just or equitable to wind up the respondent. Accordingly, I dismiss the petition with costs. However, considering that the respondent's account had been overdrawn in the sum of RM237,541.89

as aforesaid, I direct the respondent to deposit the sum of RM82,000 in a joint solicitors' account within a month of this order. The monies are to be held until the petitioner's claim is disposed off, under common law action.

Petition dismissed with costs.

Reported by Ezatul Zuria Azhari